LIBRARY
SUPREME COURT, U. S.

JAN 25 1971

Supreme Court of the United States

OCTOBER TERM, 1970

70-54

No. 1092

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL AND GULF STEVEDORE CORP.,

Petitioners,

versus

BILL LAW,

Respondent.

Respondent's Brief in Opposition To Petition for Writ of Certiorari

Joseph B. Stahl
804 Baronne Bldg.
305 Baronne St.
New Orleans, La. 70112

Ross Diamond, Jr.
610 Van Antwerp Building
Mobile, Alabama 36601
ATTORNEYS FOR RESPONDENT

J. Cecil Gardner
610 Van Antwerp Building
Mobile, Alabama 36601
OF COUNSEL

TABLE OF CONTENTS

Page

Argument Against Granting Certiorari 1

I. The Circuit Courts Are In Accord In Holding That The Warranty Of Seaworthiness Applies To A Shore-Based Longshoreman Directly and Intimately Involved In The Process Of Loading Or Unloading A Vessel And Using Equipment Which Is A Necessary And Integral Part Of The Loading Or Unloading Process

Conclusion 7

CITATIONS

Cases:

Alaska Steamship Co. v. *Petterson*, 347 U.S. 396, 74 S.Ct. 601 (1954) 2

Byrd v. American Export Isbrandsten Lines, Inc., 300 F.Supp. 1207 (E.D. Pa. 1969) 3

Daniel v. Skibs A/S Hilda Knudsen, 368 F.2d 178 (3rd Cir. 1966) 4

Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir. 1966), cert. denied, 385 U.S. 969 3

Drumgold v. Plovda, 260 F. Supp. 983 (E.D. Va. 1966) 6

Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970) 3, 5

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S.Ct. 1185 (1963) 2

Hagans v. Ellerman and Bucknell Steamship Company, 318 F.2d 563 (3rd Cir. 1963) 3

CITATIONS (Continued)

Page

Huff v. Matson Navigation Company, 338 F.2d 205 (9th Cir. 1964) cert. denied 380 U.S. 943 3

Hyter v. D. B. Denig Naklihati T.A.S., 260 F. Supp. 983 (E.D. Va. 1966) 6

Kent v. Shell Oil Company, 286 F. 2d 746 (5th Cir. 1961) 5

Litwin Owicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 817 (E.D. Pa. 1959) 3

Nacirema Operating Co., Inc. v. Johnson, 366 U.S. 212, 90 S.Ct. 347 (1969) 3

Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968) 3

Partenweederi M/S Belgrano v. Weigel, 299 F.2d 897 (9th Cir. 1962) 4

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1948) 2

Spann v. Lauritzen, 344 F.2d 204 (3rd Cir. 1965), cert. denied 382 U.S. 938 ..... 3, 4

Thompson v. Calmar Steamship Corp., 331 F.2d 657 (3rd Cir. 1964), cert. denied 379 U.S. 913 3

Statutes:

28 U.S.C. Rules of Supreme Court, Rule 19(1) (b) 6, 7

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970

No. 1092

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, and GULF STEVEDORE CORP.,
Petitioners,

versus

BILL LAW,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

If It Please This Honorable Court:

ARGUMENT AGAINST GRANTING CERTIORARI

I

THE CIRCUIT COURTS ARE IN ACCORD IN HOLDING THAT THE WARRANTY OF SEAWORTHINESS APPLIES TO A SHORE-BASED LONGSHOREMAN DIRECTLY AND INTIMATELY INVOLVED IN THE PROCESS OF LOADING OR UNLOADING A VESSEL AND USING EQUIPMENT WHICH IS A NECESSARY AND INTEGRAL PART OF THE LOADING OR UNLOADING PROCESS.

There are three decisions of this Court which outline the judicial history preceding this petition for cer-

tiorari. In the first of the three, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1948), this Court recognized that those doing a seaman's work and incurring a seaman's hazards were entitled to the warranty of seaworthiness and thus protected shore-based workers engaged aboard a vessel in work customarily performed by seamen. Six years later in *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, 74 S.Ct. 601 (1954) the Court extended the humanitarian policy protecting these workers by holding that the vessel owner's absolute duty to provide seaworthy gear, equipment, and appliances is the same when applied to the gear, equipment, and appliances of the stevedoring contractor. Finally, in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 1185 (1963) the Court, agreeing with the "ineluctable logic" of the cases, stated that seaworthiness includes fitness for loading and unloading and held "that the duty to provide a seaworthy ship and gear including cargo containers applies to longshoremen unloading the ships whether they are standing aboard the ships or on the pier."

The Fifth Circuit Court of Appeals in the instant case took *Sieracki, Petterson* and *Gutierrez* as "the major constellations by which we steer our course in this case" and reached the unavoidable conclusion that the doctrine of seaworthiness protected Bill Law as he was "intimately involved in the process of loading a vessel, injured as he moved cargo from the back to the front of the dock."

It is submitted that the other Courts of Appeal of the United States considering analogous facts have reached the same conclusion based on the same rules

already formulated by this Court. See for example, *Gebhard v. SS Hawaiian Legislator*, 425 F.2d 1303 (9 Cir. 1970); *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5 Cir. 1966), cert. denied, 385 U.S. 969; *Spann v. Lauritzen*, 344 F.2d 204 (3 Cir. 1965), cert. denied 382 U.S. 938; *Thompson v. Calmar Steamship Corp.*, 331 F.2d 657 (3 Cir. 1964), cert. denied 379 U.S. 913; *Huff v. Matson Navigation Company*, 338 F.2d 205 (9 Cir. 1964), cert. denied 380 U.S. 943; *Hagans v. Ellerman and Bucknell Steamship Company*, 318 F.2d 563 (3 Cir. 1963). For decisions of United States District Courts see: *Byrd v. American Export Isbrandsten Lines, Inc.*, 300 F. Supp. 1207 (E.D. Pa. 1969); *Litwin Owicz v. Weyerhaeuser Steamship Co.*, 179 F. Supp. 817 (E.D. Pa. 1959); *Olvera v. Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968).

In opposition to these opinions, Petitioner has brought to this Court's attention several decisions of lower Federal Courts supposedly in conflict with the holdings of the Fifth Circuit, and, broadening his search for conflict, Petitioner points to the Court's recent decision in *Nacirema Operating Co. Inc. v. Johnson*, 366 U.S. 212, 90 S.Ct. 347 (1969) as reason for review of the Fifth Circuit's well-reasoned opinion.

Nacirema, however, as Petitioner candidly concedes, deals with a problem of statutory construction in the interpretation of the Longshoreman and Harbor Workers Compensation Act, the Court framing the issue there to be: "(T)he single question of statutory construction presented by these cases is whether injuries to longshoremen occurring on piers permanently affixed to shore are compensable under the Longshore-

man and Harbor Workers Compensation Act of 1927." This Court answered that question in the negative and in spite of Petitioner's strained interpretation of that decision, its application must be limited to its holding.

Daniel v. Skibs A/S Hilda Knudsen, 368 F.2d 178 (3 Cir. 1966), affirming 253 F.Supp. 758 (E.D. Pa. 1966), is next cited as being in conflict with the Fifth Circuit's opinion in *Bill Law*. The Petitioner should take no comfort in *Daniel*, for, far from being in conflict with *Law*, it is clear that the District Court hearing the cause originally and the Third Circuit on Appeal both recognized that the same principles reiterated by the Fifth Circuit in *Law* were controlling. Further, far from holding that the warranty of seaworthiness did not apply to shore-based workers and gear intimately involved in the loading and unloading process, the District Court and the Third Circuit cited with approval and in fact as authority for their conclusion, the Third Circuit's own case of *Spann v. Lauritzen*, supra, wherein an entirely shore-based defective nitrate hopper injured an entirely shore-based longshoreman. The inescapable conclusion is that the same principles of law controlled in both instances even though the facts in *Daniel* prevented their application. It is clearly seen, then, that the law in the Third Circuit is the same as in the Fifth Circuit and that the Court there reached the same conclusions of law with commendable consistency.

Petitioner then turns to *Partenweederi M/S Belgrano v. Weigel*, 299 F.2d 897 (9th Cir. 1962), and in reply Respondent must counter that the Petitioner's problem is the same here as in *Daniel*. In *Belgrano*,

the Plaintiff, Weigel was a tractor driver whose job was to move railroad cars loaded with cargo to a point on a spur track where the cargo could be reached by the ship's gear. The District Court's finding for Weigel was reversed by the Ninth Circuit and the Appellate Court, noting that the Respondent presented expert testimony that seamen did not traditionally perform that type of work and that Weigel failed to present contrary proof, held, as a result, that he had failed to meet his burden of proof on that issue as a matter of law. Whatever validity the Ninth Circuit's decision in *Belgrano* may have had for Petitioner's position here, the Ninth Circuit itself has effectively disposed of in *Gebhard v. SS Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970), where, again, an entirely shore-based and unseaworthy straddle carrier injured an entirely shore-based longshoreman, the Court there holding that the warranty of seaworthiness did apply.

Neither, as is proposed by Petitioner, is the Fifth Circuit's opinion in the present case in conflict with its prior decision in *Kent v. Shell Oil Company,* 286 F. 2d 746 (5 Cir. 1961). In the *Kent* case the Fifth Circuit found its problems to be two-fold. "The first is the sufficiency of the proof of asserted unseaworthiness of the vessel and the equipment supposedly furnished by or adopted by the barge. The second is whether an assumed breach of such warranty extends to injuries sustained on shore by an employee of a third party performing services as an independent contractor for the vessel owner under circumstances in which the Louisiana Compensation Act would insulate such vessel owner from third party liability." *Kent,* supra, at page 748.

The case was decided on a question of Louisiana Law, the Court saying:

> "Since Louisiana forbids such recovery of damages against such a third party, it matters not whether the asserted third party claim rests on negligence of a kind known to the common law or that of a kind known to the civil law or on notions of unseaworthiness indigenous to the general maritime law." *Kent*, supra, at page 752.

After deciding the case as above, the Court went on to add the dictum quoted by Petitioner at page 16 of his brief. Respondent would urge that not only must this statement be considered dictum but that it was uttered two years prior to this Court's decision in *Gutierrez* and, further, that the Fifth Circuit has disposed of *Kent* by its decisions in *Deffes* and *Bill Law*.

Following his fruitless attempt to find dissension among the Appellate Courts where there is harmony, petitioner then turns to the decisions of the District Courts and specifically the companion cases of *Drumgold v. Plovda* and *Hyter v. D. B. Denig Naklihati T.A.S.* (E.D. Va., 1966) 260 F.Supp. 983. Respondent will not belabor the Court with needless comment on these cases. Suffice it to say that they are not decisions of Appellate Courts, and were effectively disposed of by the Fifth Circuit in the instant case.

The type of conflict between Circuit Courts of Appeals contemplated as a reason for granting certiorari by Rule 19(1) (b), 28 U.S.C. Rules of Supreme Court,

is as to matters of law, not as to conclusions which depend upon an appreciation of facts and circumstances which admit of different interpretations.

CONCLUSION

The Petitioner has demonstrated no conflict in the decisions of the various Circuit Courts of Appeal within the meaning of Rule 19(1) (b), 28 U.S.C. Rules of Supreme Court, and the questions of Federal Maritime Law presented remain clear and consistent in an unbroken pattern from *Sieracki*, *Petterson*, and *Gutierrez*. In granting certiorari in this case the Court would commit itself to a laborious case-by-case application of principles it has already established and precedent it has already announced.

The premises considered, it is respectfully submitted that the writ of certiorari should not be granted.

Respectfully submitted,

Joseph B. Stahl
804 Baronne Building
305 Baronne St.
New Orleans, La. 70112

Ross Diamond, Jr.
610 Van Antwerp Building
Mobile, Alabama 36601
Attorneys for Respondent

J. Cecil Gardner
610 Van Antwerp Building
Mobile, Alabama 36601
Of Counsel

CERTIFICATE OF SERVICE

I, Ross Diamond, Jr., one of the attorneys for Respondent, do hereby certify that I have served a copy of the foregoing Brief in Opposition on the attorneys of record for the Petitioners and am mailing a copy of same to them properly addressed, postage prepaid on this ____ day of January, 1971.

ROSS DIAMOND, JR.
Attorney for Respondent
610 Van Antwerp Building
Mobile, Alabama 36601